

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ERIC EL,

No. C 06-3696 SI (pr)

Plaintiff,

## **ORDER OF DISMISSAL**

V.

11 C. DIXON,

## Defendant.

## INTRODUCTION

Eric El, currently a prisoner at Kern Valley State Prison, filed this pro se civil rights action under 42 U.S.C. § 1983. Defendant has moved to dismiss on the ground that El failed to exhaust administrative remedies before filing the action. El has not opposed the motion, but earlier had filed a document explaining his view of the exhaustion issue. The action will be dismissed because administrative remedies were not exhausted before it was filed.

## BACKGROUND

22 El alleged in his complaint that defendant Dixon used excessive force on him on  
23 September 29, 2005, at Salinas Valley State Prison. The complaint alleged that El was in his cell  
24 and "passed out" with part of his body in the food port of his cell due to the lack of air  
25 circulation in his cell. Complaint, p. 4. Defendant correctional officer ("C/O") Dixon allegedly  
26 approached the cell, gave direct orders for El to move out of the food port, and squirted El twice  
27 with pepper spray when El did not respond to the orders. El alleged that he had not responded  
28 to the pepper spray because he was unconscious.

1 El received a CDC-115 rule violation report for the incident for willfully obstructing a  
2 peace officer. A disciplinary hearing was held. El pled not guilty and stated that his cell-mate  
3 put him in the food port to get air. Sciandra Decl., Exh. A. He was found guilty and assessed  
4 90 days credit forfeiture for the offense. The CDC-115 is marked as having been given to the  
5 inmate on November 14 or 19, 2005.

6 El filed a CDC-602 inmate appeal dated November 30, 2005, in which he complained of  
7 excessive use of force by C/O Dixon for spraying him with pepper spray. He did not complain  
8 about the disciplinary decision or any procedural problems in the disciplinary proceeding. The  
9 CDC-602 appeal form is marked as having been received by prison officials on December 6,  
10 2005. The appeal was screened out and returned to El with the notations that it was not  
11 completed properly and was not timely. See Complaint, unnumbered exhibit. The form used  
12 to screen out the appeal had a pre-printed message at the bottom: "This screening action may not  
13 be appealed. If you allege the above reason is inaccurate, then attach an explanation on a  
14 separate piece of paper, or use the back of this screen out – do not write any more on the appeal  
15 itself. Please return this form to the Appeals Coordinator with the necessary information  
16 attached." Id. El did nothing thereafter to pursue his inmate appeal.

## DISCUSSION

19 "No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983],  
20 or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility  
21 until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The  
22 State of California provides its inmates and parolees the right to appeal administratively "any  
23 departmental decision, action, condition or policy perceived by those individuals as adversely  
24 affecting their welfare." See Cal. Code Regs. tit. 15, § 3084.1(a). In order to exhaust available  
25 administrative remedies within this system, a prisoner must proceed through several levels of  
26 appeal: (1) informal resolution, (2) formal written appeal on a CDC 602 inmate appeal form, (3)  
27 second level appeal to the institution head or designee, and (4) third level appeal to the Director

1 of the California Department of Corrections. See id. § 3084.5; Ngo v. Woodford, 126 S. Ct.  
2 2378, 2383 (2006); Barry v. Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997).

3 Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. Porter v. Nussle, 534  
4 U.S. 516, 524 (2002). All available remedies must be exhausted; those remedies "need not meet  
5 federal standards, nor must they be 'plain, speedy, and effective.'" Id. (citation omitted). Even  
6 when the prisoner seeks relief not available in grievance proceedings, notably money damages,  
7 exhaustion is a prerequisite to suit. Id.; Booth v. Churner, 532 U.S. 731, 741 (2001). The statute  
8 requires "proper exhaustion" of available administrative remedies. See Woodford v. Ngo, 126  
9 S. Ct. 2378, 2387 (2006).

10 A prisoner's failure to exhaust administrative remedies is a matter in abatement.  
11 Defendant has the burden of raising and proving the absence of exhaustion, and may do so by  
12 way of an unenumerated Rule 12(b) motion. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.  
13 2003). "In deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the court  
14 may look beyond the pleadings and decide disputed issues of fact." Id. at 1119-20, citing Ritza  
15 v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 368 (9th Cir. 1988). The court  
16 can decide factual issues in a jurisdictional or related type of motion because there is no right  
17 to a jury trial as to that portion of the case, unlike the merits of the case (where there is a right  
18 to a jury trial). See id. Wyatt and Ritza allow this court to resolve factual disputes, but only  
19 with regard to the exhaustion issue.

20 El did not exhaust the administrative remedies available to him. His inmate appeal never  
21 made it to the director's level because it was screened out at the first level as untimely. He  
22 argues that his appeal was not untimely because he was waiting for the CDC-115 to be  
23 completed before he filed his appeal. This argument fails for two reasons. First, the inmate  
24 appeal did not even mention the CDC-115 or the discipline imposed and did not depend on the  
25 outcome of the disciplinary proceedings to be ripe for appeal. El's claim in his inmate appeal  
26 was that Dixon had used excessive force, and not that he should not have been disciplined or that  
27 the disciplinary proceedings were defective. Second, El's argument is made too late. El did not  
28

1 make his argument in his inmate appeals process, notwithstanding the direction on the screening  
2 form that instructed the inmate how to challenge a decision that screened out the appeal for a  
3 procedural problem such as untimeliness. When his inmate appeal was screened out, El did not  
4 pursue the matter further and did not tell the inmate appeal screener that he had been waiting for  
5 the CDC-115 to be resolved before he appealed.

6 A prisoner cannot satisfy the exhaustion requirement "by filing of an untimely or  
7 otherwise procedurally defective administrative grievance or appeal." Woodford v. Ngo, 126  
8 S. Ct. at 2382. A prisoner must complete the administrative review process in accordance with  
9 the applicable procedural rules, including deadlines, as a precondition to bringing suit in federal  
10 court. See id. at 2384. El did not. His inmate appeal at the first level was untimely and rejected  
11 for that reason. El never received a director's level decision, as required for exhaustion of  
12 administrative remedies by a California prisoner. Defendant has carried his burden to prove that  
13 El did not satisfy the exhaustion requirement with regard to his Eighth Amendment claim against  
14 defendant Dixon. The action must be dismissed without prejudice.

15  
16 **CONCLUSION**

17 Defendant's motion to dismiss is GRANTED because plaintiff failed to exhaust  
18 administrative remedies before filing this action. (Docket # 12.) This action is dismissed  
19 without prejudice. The clerk shall close the file.

20 IT IS SO ORDERED.

21 Dated: January 23, 2008

  
\_\_\_\_\_  
SUSAN ILLSTON  
United States District Judge

22  
23  
24  
25  
26  
27  
28